

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

KOMATSU FINANCIAL LIMITED
PARTNERSHIP,

Plaintiff,

v.

CIVIL ACTION NO. 5:18-cv-01336

KIRBY LAND COMPANY, INC.,

Defendant.

ORDER

The Court has reviewed *Plaintiff Komatsu Financial Limited Partnership's Motion for Partial Summary Judgment* (Document 30), *Plaintiff Komatsu Financial Limited Partnership's Memorandum in Support of Its Motion for Partial Summary Judgment* (Document 31), the *Defendant's Response in Opposition to Plaintiff Komatsu Financial Limited Partnership's Motion for Partial Summary Judgment* (Document 32), the *Reply in Support of Plaintiff's Motion for Partial Summary Judgment* (Document 34), and the *Supplement to the Reply in Support of Plaintiff's Motion for Partial Summary Judgment* (Document 35). After careful consideration, the Court finds that the Plaintiff's motion for partial summary judgment should be granted.

A motion hearing was held on September 12, 2019. At the hearing, the parties agreed to the amount owed and the calculation of late fees. The parties briefly argued regarding attorneys' fees, and the court ruled that attorneys' fees are to be awarded up to the date of the filing which resolved the dispute of late fee calculations. The Court has also reviewed the Plaintiff's

Verification and Affidavit submitted at the motion hearing. The Court makes the following findings, based on the verification and affidavit:

1. The unpaid principal balance including interest as of September 12, 2019, is \$9,301,029.80.
2. Paragraph 4(a) of the Term Note, attached to the Complaint as Exhibit A, establishes Komatsu's right to recover from Defendant late fees for any payment that is not paid within ten days of the due date.
3. Defendant has failed to pay, within 10 days of the due date, the payments that were due on October 18, 2017, and every monthly payment thereafter through and including the payment that came due on August 18, 2019—a total of 23 payments.
4. The amount of each scheduled payment was \$119,657.07. Accordingly, the late fee is \$5,982.85 for each payment, for a total of \$137,605.63 as of September 12, 2019.
5. Late fees of \$5,982.85 will continue to accrue monthly commencing with the September 18, 2019 payment which will be deemed to be late on September 28, 2019, and on the 28th day of each subsequent month, until the date of judgment.


Attorneys' fees are to be awarded up to May 10, 2019, the date on which the Plaintiff submitted the reply in support of Plaintiff's motion for partial summary judgment, acquiescing to the Defendant's position with respect to calculation of late fees. The Court finds that no attorneys' fees are to be awarded past the date of that filing. In the event the parties are not in agreement as to the amount of reasonable attorneys' fees, Counsel for the Plaintiff shall submit a request and

supporting documentation for reasonable attorneys' fees within two (2) weeks of entry of this order.

The Court **ORDERS** that the *Plaintiff Komatsu Financial Limited Partnership's Motion for Partial Summary Judgment* (Document 30) be **GRANTED** subject to the amounts and conditions set forth herein.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

ENTER: September 16, 2019



IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA